PETITION NOT PRINTED

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 602

ALEXANDROS THEODORAKIS,

Petitioner,

v.

JOHN XILAS, as Master,
THEOFANO MARITIME CO. LTD., as owner,
S. LIVANOS & CO., INC., as operating agents;
all being interested in the operation of the
Steamship ALFIOS,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY E. MCCOY, JR.
Of Counsel

Norfolk, Virginia
March 19, 1953

INDEX TO BRIEF

	Page
STATEMENT	1
ISSUE	7
ARGUMENT:	
I. The Issue Raised in the Petition for Certiorari Has Been Decided by the Court	8
II. An Admiralty Court Applies Equitable Principles	9
III. A Voluntary Dismissal Without Prejudice and Without Payment of Costs Will Not Be Allowed If It Results in Unnecessary and Prolonged Litigation	14
IV. Under Admiralty Rule 44 As Applied to This Case, the District Court Properly Required Libellant to Pay Costs	17
CONCLUSION	20

Table of Cases

Alexandros Theodorakis v. John Xilas, et al, 200 Fed. (2) 107 5
Chicago & Alton R. Co. et al v. Union Rolling Mill Co., 109 U. S. 702, p. 713 11
City of Detroit v. Detroit City R. Co. et al, 55 Fed. 569, p. 572 12
Confiscation Cases (7 Wallace), 74 U. S. 454 8, 19
Federal Savings & Loan Ins. Corp. v. First Natl. Bank, 148 Fed. (2) 731 19
Home Owners' Loan Corp. v. Huffman, 134 Fed. (2) 314 19
Intl. Shoe Co. v. Cool, 154 Fed. (2) 778; Cert. Denied 329 U. S. 726; 67 S. Ct. 76; 91 L. Ed. 628 19
Jamison v. Fullerton et al, 3 Fed. (2d) 312 16
Jones v. Securities & Exchange Comm., 298 U. S. 1; 56 S. Ct. 654 14
McCann v. Bentley Stores Corp., 34 Fed. Supp. 234 18
Mott v. Conn. Genl. Life Ins. Co., 2 F. R. D. 523 19
Pullman's Palace-Car Co. v. Central Transportation Co., 171 U. S. 138; 18 S. Ct. 808; 43 L. Ed. 108 14
Welsbach Light Co. v. Mahler (Cir. Ct. S. D. N. Y., June 6, 1898), 88 Fed. 427 15
Wilson v. Jolly, 7 R. R. D. 649 19

STATUTES AND RULES

Page

Admiralty Rule 44 17

Federal Rules Civil Procedure No. 41 18

Title 46 United States Code Annotated, Sections 596, 597 4

TEXTBOOKS

Benedict on Admiralty, Vol. 1 and Vol. 2 ..... 9, 10

30 Corpus Juris Secundum, Equity No. 563 ..... 10, 16

Federal Practice and Procedure, Vol. 2 11

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(NOTE: The parties are designated and referred to as they appeared in the Trial Court. (App.) refers to the appendix to this brief and (R.) to the Record).

STATEMENT

This brief is submitted in opposition to the petition for a writ of certiorari filed herein by Alexandros Theodorakis. Petitioner seeks a review of a decision of the United States Court of Appeals for the Fourth Circuit which affirmed a prior decision of the United States District Court for the Eastern District of Virginia.

In order that the Court may understand the complete background of this proceeding, we shall review the history of this case.

On August 27, 1948 the depositions of the respondents herein, John Xilas, and two other witnesses (George Xilas and George Tsichlias) were taken by agreement, and all witnesses were examined at considerable length in cross-examination by the proctors for libellant. As the filing of these depositions was waived by agreement and the testimony was never introduced in the case at the time of the hearing, the depositions are not a part of the record.

Also, on August 27, 1948 proctors for the respondents herein accepted legal service on the libel.

For some unknown reason, proctors for libellant did not file the libel, on which service had been accepted until May 28, 1949, a period of approximately ten months after acceptance of service. (R. 2).

On August 24, 1948 the libellant herein had filed a similar and identical cause of action in the Corporation Court of the City of Newport News, Virginia. By order entered in that State Court on July 21, 1949 the proceeding therein was dismissed on two grounds, viz:

1. The Corporation Court of the City of Newport News did not have jurisdiction.

2. The same and identical cause of action was by that date pending in the United States District Court—In Admiralty No. 7308—(The cause from which this application arises).

Before filing his libel in the United States District Court for the Eastern District of Virginia, Norfolk Division, on May 28, 1949, libellant had on May 23, 1949 filed the same and identical cause of action in the United States District Court for the Eastern District of Virginia, Newport News Division, Civil Action No. 244. This proceeding was dismissed by order of February 26, 1951 on the following grounds:

1. There was never any personal service on any of the respondents.

2. The same and identical cause of action was then pending before the same Court, sitting in Admiralty in the Norfolk Division, and had proceeded to an interlocutory decree.

3. The respondents had not made a general appearance in the case.

No appeal was ever sought or attempted from the order of dismissal in the Corporation Court of the City of Newport News, or from the order of dismissal of the United States District Court for the Eastern District of Virginia, Newport News Division, where this matter was pending as a civil action. Those orders have now become final.

As stated above, the libel herein was filed ten months after acceptance of service and also after full and complete examination of the respondents' witnesses. On July 6, 1949 over eleven months after acceptance of service, libellant served on respondents a

series of interrogatories, a motion for production of documents and a request for admission of sixty-six items. (R. 16-31). These various forms of discovery process were either answered, or due exception taken thereto. (R. 37-46).

In answer to one of the sixty-six requests for admission of facts, the respondents admitted that libellant had been paid an advance of unearned wages in the amount of $250.00 at Baltimore, Maryland, in March 1947. (R. 44). Thereupon, and on motion of the libellant, the District Court on April 6, 1950 handed down a memorandum allowing an interlocutory decree in this admiralty proceeding in favor of libellant in the amount of $250.00, but denying any recovery of "waiting time" or two for one pay, under the provisions of *Title 46, U.S.C.A., Sections 596, 597. (App. 1).* The amount of the award was deposited in the Registry of the Court, and under the terms of the interlocutory decree entered May 23, 1950 the Clerk was directed to pay this sum to Messrs. Morewitz & Morewitz, proctors of record for the libellant. (App. 2). Thereafter, no further proceedings were taken herein until the Court, on September 28, 1951, set this matter for trial and final disposition on its merits, the hearing to be on January 27, 1952.

On December 17, 1951 libellant filed a motion requesting the Court to find respondents in default for failure to answer the interrogatories, motion for production of documents, and sixty-six items of the request for admission of facts.

This case came on for a hearing on January 17, 1952, at which time the Court denied the libellant's motion which had been filed on December 17, 1951, asserting the insufficiency of the answers of respondents to the various discovery proceedings (R. 60-A) and the Court directed that the case be resumed the following day, January 18, 1952, for the submission of the evidence.

Proctors for libellant then advised the Court that they had no available evidence to submit and therefore moved for a non-suit, or dismissal without prejudice. This motion was opposed by respondents. (App. 6).

On January 31, 1952 the Court handed down a memorandum allowing libellant a dismissal without prejudice upon payment of costs. Libellant was also allowed a thirty day period within which to discharge the costs assessed against him. (App. 6).

Libellant refused to pay the costs, and thereupon on March 26, 1952 a final decree dismissing this case with prejudice was entered.

Libellant then appealed his case to the United States Court of Appeals for the Fourth Circuit. Significantly, the appellant (Theodorakis, who is the petitioner here), did not appear either by counsel or in person when the case was called for oral argument in Baltimore, Maryland, on November 14, 1952.

On November 15, 1952 the Court of Appeals for the Fourth Circuit affirmed the District Court in a

Per Curiam opinion: 200 Fed. (2d) 107:

"Per Curiam: This is an appeal in a seaman's wage case. The case was instituted by the filing of a libel in May 1949. In May 1950 an interlocutory decree was entered in favor of libellant granting him a recovery in the sum of $250 on facts developed by answers to interrogatories which he had propounded. The case came on for hearing on January 17, 1952, when libellant asked to be allowed to take a non-suit without prejudice. The District Judge granted this permission on condition that libellant within thirty days pay the statutory costs which had been incurred in the case and upon further condition that if such costs were not paid the case would then be dismissed with prejudice. Upon the failure of libellant to pay the costs in accordance with the condition, an order was duly entered dismissing the case with prejudice. The appeal challenges the power of the court to impose the payment of costs as a condition of the right to take a non-suit without prejudice. We think that this was a matter resting in the sound discretion of the District Judge and that the discretion was properly exercised. There would be no question about the correctness of the questioned action if the rules of civil procedure were applicable in admiralty. See rule 44 (a) (2). We think it equally clear that the action was proper under the practice in admiralty. The Confiscation Cases, 7 Wall. 454 Section 1916 of Title 28 of the Code permits a seaman to prosecute suits for wages without prepayment of costs. There is nothing in that section, however, which permits him as a matter of right to discontinue without prejudice a case which he has instituted and in which costs have been incurred."

The present application for certiorari is, therefore, an effort to have this Court review and reverse the decisions of both the Court of Appeals for the Fourth Circuit and the District Court for the Eastern District of Virginia.

Under these circumstances, therefore, the only conditions under which a writ of certiorari will issue are:

1. Where the validity of a treaty or statute of the United States is drawn in question;

2. Where the validity of a State statute is drawn in question;

3. Where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States, Title 28, U.S.C.A. Sec. 1257.

Through this brief in opposition to the petition for writ of certiorari, the respondents will show that none of the foregoing conditions or reasons exist and therefore the petition should be denied.

ISSUE

Upon full consideration of the history of this litigation, and the decision of the District Court as af-

firmed by the Court of Appeals for the Fourth Circuit the sole issue in this application for certiorari is:

CAN PAYMENT OF COSTS BE IMPOSED AS A CONDITION PRECEDENT TO A DISMISSAL WITHOUT PREJUDICE IN AN ADMIRALTY PROCEEDING.

ARGUMENT

I. The Issue Raised in the Petition for Certiorari Has Been Decided by the Court

The precise question raised by the petition for certiorari was answered by this Court in the Confiscation Cases, 74 U. S. (7 Wallace) 454. Mr. Justice Clifford delivered the opinion and answered the present question at page 457:

> "Under the rules of the common law it must be conceded that the prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his option, and without other liability to his adversary than the payment of taxable costs which have accrued up to the time when he withdraws his suit.
>
> "Precisely the same rule prevails in the admiralty courts, and consequently the libellant has the right at any stage of the cause voluntarily to discontinue the same, and the only penalty to which he can legally be subjected, in the absence of any statutory regulation, except, perhaps, in prize cases, is the payment of the costs of the proceedings."

The District Court and the Court of Appeals cited and relied on this opinion by Mr. Justice Clifford. (App. 5 and Page 6 of this brief). It appears, therefore, that the action taken by both Courts below has been in conformity with the prevailing view of the United States Supreme Court.

The particular case from which this application for certiorari arises was pending on the admiralty side of the District Court. The Court was, therefore, sitting as an Admiralty Court.

II. An Admiralty Court Applies Equitable Principles

The jurisdiction, powers and authority of an Admiralty Court embrace both legal and equitable principles as applied to maritime matters.

As stated in *Benedict on Admiralty,* Vol. 1, p. 148-151:

> "Sec. 71 — ADMIRALTY APPLIES EQUITABLE PRINCIPLES. Admiralty courts are courts of limited jurisdiction confined to maritime matters, but within those confines have the capacity of a court of law, and in certain respects, the capacity of a court of equity . . . . The court is bound, by its nature and constitution, to give judgment upon equitable principles and according to the rules of natural justice. It cannot in a technical sense be called a court of equity. It is rather a court of justice."

The District Court, sitting in admiralty, determines cases submitted to it upon equitable principles. *Benedict on Admiralty,* Vol. 2 at page 30 has summarized this procedure:

> "Sec. 223—EQUITY AND JUSTICE ARE THE FOUNDATION. The court is bound to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice. This principle of the maritime law pervades the whole practice of the admiralty in the United States. The grand object of doing justice between the parties is superior to technical rules and forms and where the stricter practice of the common law, or the civil law, might have turned a party out of court, or defeated or perverted justice by considering an arbitrary rule of procedure as paramount to all other considerations, the American admiralty has found, in the educated reason and cultivated discretion of the court, the means of defeating chicanery, rectifying mistakes, supplying deficiencies, and suggesting to the party the means of reconstructing his case, if necessary, without the loss of such real progress as he may have already made."

Therefore, the libellant herein can be likened unto a petitioner or complainant in a chancery proceeding.

It is a well settled principle of equity that a petitioner or complainant will not be allowed to dismiss his petition or bill without prejudice after the entry of an interlocutory decree affecting the merits of the proceeding. To this effect see *30 Corpus Juris Secundum* (Equity No. 563), at page 957:

> "A voluntary dismissal without prejudice is not permitted after an order affecting the merits."

This view is even clearer as stated in *Federal Practice and Procedure* (Barron and Holtzoff), Vol. 2, Section 911, at page 614:

> "In equity cases the plaintiff had a *qualified* right to dismiss at any time before an interlocutory or final decree unless the defendant would thereby suffer some prejudice beyond the threat of another suit." (Italics ours).

Considering the history and background of the case sub judice, respondents would be severely prejudiced by a dismissal without prejudice. The prejudice respondents would suffer is far greater than a mere threat of another suit. After all, *on libellant's motion* this cause had already proceeded to an interlocutory decree. It must be remembered that libellant has already attempted to bring this same and identical suit in the Corporation Court of the City of Newport News, Virginia, and also as a civil action in the United States District Court for the Eastern District of Virginia, Newport News Division. Needless to say, each such incident has proved expensive and time-consuming to the respondents herein.

However, for the sake of argument, let us assume that a voluntary non-suit or dismissal without prejudice would not prejudice the respondents.

It has been well settled by the Supreme Court of the United States that in a chancery proceeding, the petitioner or complainant, upon moving for a dismissal of his bill, must pay the costs. This principle was expressed in *Chicago & Alton Railroad Company et al v. Union Rolling Mill Company,* 109 U. S. 702, p. 13:

> ". . . . It may also be conceded that, as a general rule, a complainant in an original bill has the

right at any time, *upon payment of costs,* to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that *after a decree, whether final or interlocutory,* has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant." (Italics ours).

The requirement imposed on a petitioner or complainant to pay the defendant's costs upon a motion for dismissal is thoroughly discussed in *City of Detroit v. Detroit City Ry. Co., et al,* 55 Fed. 569, particularly at page 572:

"The motion to dismiss presents a question of equity practice which is not as clearly settled as could be desired. It seems hardly fair that after a case has been got ready for hearing and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of the benefit of all that preparation by a dismissal, under which he reserves full power to harass him by bringing a new bill when he shall choose to do so, *on the simple condition that he pay the costs,* which are so notoriously inadequate to compensate defendant for his actual expenditures. In England, since 1845, the rule has been, by virtue of an order in chancery, that a dismissal of a bill after a cause is set for hearing is on the merits and must be a bar to the bringing of another bill. General Ordinance No. 117; Mayor etc. of Liverpool v. Chorley Waterworks Co., 2 DeGex, M & G 852; In re Orrell Colliery & Fire Brick Co., 12 Ch. Div. 681, 682. The equity rules of the United States Supreme Court adopting the practice of the high

court of chancery of England were published in 1842, and it follows, therefore, that the equity practice in this regard of the federal courts continues to be that prevailing in the English Chancery Courts before the new rule was promulgated in 1845. Badger v. Badger, 1 Cliff. 237; Stevens v. The Railroads, 4 Fed. Rep. 97; Western Union Tel. Co. v. American Bell Tel. Co., 50 F. Rep. 662.

"It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, *on payment of costs,* was, of course, except in certain cases Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind The exceptions are as broadly and clearly stated as anywhere by Chancellor Harper of South Carolina, in the case of Bank v. Rose, 1 Rich. Eq. 294, as follows:

'Harper, Ch. The general rule is, as contended for, that the plaintiff at any time before decree, perhaps before the hearing, may dismiss his bill as of course *upon the payment of costs;* but certainly it cannot be said that the rule is without exception. The exception, as stated in general terms, is that it is within the discretion of the court to refuse him permission to do so if the dismissal would work a prejudice to the other parties; and I gather from the cases, compared with each other, that it is not regarded as such prejudice to a defendant that the complainant, dismissing his own

bill, may at his pleasure harass him by filing another bill for the same matter. But whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted'." (Italics ours).

This opinion by Circuit Judge Taft (later Chief Justice of the United States) has been approved and adopted by the Supreme Court of the United States:

Jones v. Securities and Exchange Commission,
298 U. S. 1; 56 S. Ct. 654

Pullman's Palace-Car Co. v. Central Transp. Co.,
171 U. S. 138; 18 S. Ct. 808; 43 L. Ed. 108.

Therefore, the District Court, sitting in admiralty, correctly exercised and applied an equitable principle when it required libellant to pay the costs of this proceeding as a condition precedent to a voluntary nonsuit or a dismissal without prejudice.

III. A Voluntary Dismissal Without Prejudice and Without Payment of Costs Will Not Be Allowed If It Results in Unnecessary and Prolonged Litigation

This particular litigation dates back to August 24, 1948 when an identical suit was filed in the Corporation Court of Newport News, Virginia. The case sub judice had been pending since May 28, 1949. Therefore, when trial date was reached on January 17, 1952, the Court had ample authority for denying the motion for a

voluntary non-suit without payment of costs as that would only have resulted in unnecessary and prolonged litigation.

A case directly in point is *Welsbach Light Co. v. Mahler* (Cir. Ct. S.D. N.Y., June 6, 1898), 88 Fed. 427. The facts and opinion therein are as follows:

> "This was a suit in equity by the Welsbach Light Company against William Mahler. The cause was heard on complainant's motion for leave to discontinue.
>
> John R. Bennet for the motion.
>
> Edward N. Dickerson, opposed.
>
> LACOMBE, Circuit Judge.
>
> 'This case was at issue by filing of replication more than two years ago. Since that time nothing has been done by complainant, except serving the papers for this motion. In consequence there is no evidence upon which complainant could ask for judgment; nor has the time to take testimony been extended by order of court, nor by express stipulation, nor by implied stipulation, as in cases where both sides take testimony after the expiration of the time fixed by rule. Defendant is therefore entitled to put the cause on the equity calendar, and take an order dismissing the complaint. To allow the plaintiff to discontinue would deprive defendant of the right to enter such judgment of dismissal, and possibly avail of it hereafter in future litigation between the same parties. The

motion for leave to discontinue is denied; but, if complainant so desires, a decree may be entered reciting the progress of the action, and dismissing complaint *with costs to defendant'.*" (Italics ours).

This principle of equity is briefly summarized at *30 Corpus Juris Secundum* (Equity No. 563) at page 957:

> "A voluntary dismissal without prejudice is not permitted . . . . where a dismissal would lead to unnecessary and prolonged litigation. A dismissal without prejudice has been denied where the cause has remained a long time at issue."

In all fairness to petitioner, there were some settlement negotiations for which reason libellant may have withheld any activity for a reasonable period. However, that was no excuse for libellant's failure ever, at any time subsequent to acceptance of service on August 28, 1948, to appear in person or attempt to further his cause by giving his testimony in deposition. *Respondents herein were under obligation to appear and defend this suit for three and a half years, during which libellant took absolutely no affirmative action to prosecute his claim!*

The principle announced in the Welsbach case (supra) was followed in *Jamison v. Fullerton et al.,* 3 Fed. (2d) 312.

Again we revert to the underlying thought that admiralty is founded on equity and justice, and embraces and applies equitable principles to the cases submitted for adjudication.

It follows, therefore, that under the Welsbach case (above) the District Court properly required libellant to pay the costs as a condition precedent to a voluntary dismissal without prejudice, in view of the length of time the case sub judice has been in litigation.

IV. Under Admiralty Rule 44 as Applied to This Case, the District Court Properly Required Libellant to Pay Costs

There is no provision in the admiralty rules relating to dismissal of an action without prejudice; nor is there any provision pertaining to a motion for summary judgment. *Admiralty Rule 44* provides as follows:

> "Rule 44. Right of trial courts to make rules of practice.—In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

Upon motion of petitioner for a summary judgment (R. 32), the District Court exercising its discretion under Rule 44 referred to the summary judgment procedure as provided in the Federal Rules of Civil Procedure, and on April 6, 1950 handed down its memorandum opinion allowing an interlocutory decree. (App. 1). The decree itself was entered on May 23, 1950. (App. 2).

This action by the Court *on petitioner's motion* for summary judgment was tantamount to adoption in this case of the provisions of the Federal Rules of Civil Procedure.

Thus, when libellant moved for a voluntary nonsuit or dismissal without prejudice, which motion was opposed by respondents, the Rules of Civil Procedure again became a guide or analogy in the exercise of judicial discretion.

The Federal Rules of Civil Procedure refer specifically to the procedure for dismissal of an action.

"Rule 41—Dismissal of Actions.

(a) Voluntary Dismissal: Effect thereof.

(1) By plaintiff; by stipulation . . . . . .

(2) By order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court, *and upon such terms and conditions as the court deems proper.*" (Italics ours).

This rule has been interpreted many times and universally held to require the plaintiff to pay costs upon a motion for a voluntary dismissal without prejudice.

This rule authorizes a dismissal without prejudice upon such terms and conditions as the Court deems proper to compensate the defendant for the expenses he has suffered.

McCann v. Bentley Stores Corp., 34 Fed. Supp. 234

Federal Savings & Loan Ins. Corp. v. First Natl. Bank, 148 Fed. (2) 731
Wilson v. Jolly, 7 F.R.D. 649
Mott v. Connecticut Gen. Life Ins. Co., 2 F.R.D. 523

Moreover, the defendant's right to receive payment of his costs upon plaintiff's motion for a dismissal without prejudice, is *not* satisfied by a judgment for costs entered against the plaintiff, as a judgment is *not* equivalent to payment of the costs.

Home Owners' Loan Corp. v. Huffman, 134 Fed. (2d) 314
Intl. Shoe Co. v. Cool, 154 Fed. (2d) 778. Cert. Denied. 329 U. S. 26; 67 S. Ct. 76; 91 Ed. 628

Having drawn an analogy from the Civil Rules on libellant's motion for summary judgment, the District Court under Admiralty Rule 44 was well within sound judicial discretion when it required libellant to make payment of costs as a condition precedent to a voluntary dismissal without prejudice.

However, the Court below was not limited to an analogy or reference to the Civil Rules.

Mr. Justice Clifford of the United States Supreme Court stated the controlling principle in his opinion in the *Confiscation Cases,* 74 U. S. (7 Wallace) 454 at page 457. (Page 8 of this brief).

There was adequate authority, therefore, for the District Court's action.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied

There are several reasons why the petition for certiorari should be denied.

The sole issue raised by the petition has already been answered and determined by the Supreme Court of the United States. There is no conflict between the decisions of the Court of Appeals, the District Court and the opinion of this Court in the Confiscation Cases.

There is no real conflict of authority as to the basic legal principle involved. There are no new or novel questions needing further clarification. The validity of any statute or treaty of the United States or of any State is not drawn in question. There is no question of general interest warranting the granting of a writ of certiorari in accordance with the petitioner's application.

For these reasons the decrees of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the Eastern District of Virginia, should not be disturbed and a writ of certiorari should be denied.

Respectfully submitted,

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